Eye Weather, Sole Proprietorship *and* Service Employees International Union, Local 100, AFL–CIO. Case 16–CA–18583

June 30, 1998

DECISION AND ORDER

BY MEMBERS LIEBMAN, HURTGEN, AND BRAME

On March 2, 1998, Administrative Law Judge Richard J. Linton issued the attached decision. The Respondent filed exceptions and a supporting brief.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and brief and has decided to affirm the judge's rulings, findings,[1] and conclusions[2] as modified and to adopt the recommended Order.

In its exceptions, the Respondent contends, inter alia, that it had no obligation to recognize and bargain with the Union because the bargaining relationship between the Union and the predecessor employers was tainted from the beginning. The Respondent argues that the initial recognition of the Union by another contractor about 6 years earlier was unlawful because it was based on authorization cards solicited by a supervisor.

We reject this defense. Section 10(b) of the Act confines the issuance of unfair labor practice complaints to events occurring during the 6 months immediately preceding the filing of a charge. The Board has held, in light of the Supreme Court's decision in *Local Lodge No. 1424, IAM, AFL–CIO (Bryan Mfg. Co.) v. NLRB*, 362 U.S. 411 (1960), that a respondent may not defend against a refusal-to-bargain allegation on the ground that the original recognition, occurring more than 6 months before charges had been filed in the proceeding raising the issue, was unlawful. See *North Bros. Ford, Inc.*, 220 NLRB 1021 (1975), and cases cited therein. Any such defense is barred by Section 10(b), which, as the Court explained in *Bryan*, was specifically intended by Congress to stabilize bargaining relationships.

Applying this principle to the instant case, we find that the Respondent is barred by Section 10(b) of the Act from attacking the validity of the predecessor employers' relationships with the Union because such a defense relies on alleged events that occurred outside the 10(b) period. Accordingly, we agree with the judge that the Respondent violated Section 8(a)(5) and (1) of the Act by refusing to recognize and bargain with the Union.

AMENDED CONCLUSIONS OF LAW

1. Substitute the following for Conclusion of Law 1:

''1. The Respondent, Eye Weather, a Sole Proprietorship, is an employer within the meaning of Section 2(2), (6), and (7) of the Act.''

2. Substitute the following for Conclusion of Law 4:

''4. Since March 1, 1997, the Union has been the exclusive bargaining representative of Eye Weather's employees in the following appropriate collective-bargaining unit:

> All employees employed by Eye Weather at the Winkler County Airport in Wink, Texas, taking weather observations, excluding supervisors.''

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge and orders that the Respondent, Eye Weather, a Sole Proprietorship, Wink, Texas, its officers, agents, successors, and assigns, shall take the action set forth in the Order.

Robert G. Levy II, Esq. for the General Counsel.
Polly K. Montgomery, Owner, of Palacios, Texas, for the Respondent, Eye Weather.
Kenneth J. Schneider Jr., Union Representative, of New Orleans, Louisiana, for the Charging Party, Local 100.

DECISION

STATEMENT OF THE CASE

RICHARD J. LINTON, Administrative Law Judge. This is a successorship case. On March 1, 1997, under a contract with the FAA, Eye Weather took over the work of taking weather observations at the Winkler County Airport at Wink, Texas. The work previously had been performed by Midwest Weather, Inc., also under contract with the FAA. Midwest Weather had a collective-bargaining agreement with the Union. On March 1–2, 1997, Eye Weather hired Midwest's bargaining unit personnel and continued the operation uninterrupted. On April 12, 1997, the Union orally demanded recognition. By letter dated April 16, Eye Weather declined to recognize and bargain. Finding Eye Weather to be a successor employer of the business enterprise, an enterprise that also carried with it the obligation for the successor employer to recognize and bargain with the incumbent Union, I find

[1] The Respondent has excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

Further, in affirming the judge's finding that the Respondent, as a successor employer, violated Sec. 8(a)(5) and (1) of the Act by refusing to recognize and bargain with the Union, we note that the Respondent, at the time it began its operations, employed at the least a substantial and representative complement of unit employees.

[2] We shall amend the judge's Conclusions of Law to correct an inadvertent error and to accurately reflect the date the Union became the exclusive bargaining representative of the Respondent's employees.

that, as alleged, Eye Weather violated Section 8(a)(5) and (1) of the Act on April 16, 1997 when it refused to recognize and bargain with the Union. I order it to do so.

I presided at this 1-day trial (Sep. 2, 1997) in Odessa, Texas. Trial was pursuant to the July 22, 1997 complaint and notice of hearing (complaint) issued by the General Counsel of the NLRB through the Regional Director for Region 16 of the Board. The complaint is based on a charge filed, and thereafter twice amended, by Service Employees International Union, Local 100, AFL–CIO (Union or Local 100), against Eye Weather, the Respondent. Although the charge, as amended, alleges violations of Section 8(a)(1), (3), and (5) of the Act, the Government's complaint contains only a single violation allegation, that being the allegation that Eye Weather violated Section 8(a)(5) and (1) of the Act when, by its letter of April 16, 1997, it refused to recognize and bargain with the Union. Admitting the refusal, Eye Weather denies violating the Act.[1] Presumably the 8(a)(1) and (3) allegations of the charge were either withdrawn or dismissed, but no amended charge, with such matters deleted, was filed.

As amended at trial (1:10–14), the pleadings, both complaint and answer, were amended so as to establish that the Board has both statutory and discretionary jurisdiction over Eye Weather and that Eye Weather is a statutory employer and that the Union is a statutory labor organization. As the amended pleadings further establish, Eye Weather, a sole proprietorship located at Palacios, Texas, operates weather observatory stations, one of which (the operation involved here) is located at the Winkler County Airport at Wink, Texas.

Five witnesses testified before me. The General Counsel called Polly K. Montgomery (Respondent's owner), Union Representative Kenneth J. Schneider Jr., and Judy Whitson (a former weather observer at Wink, and terminated by Eye Weather on May 2; 1:73, Montgomery).[2] The Government then rested, as did the Charging Party. (1:160–161.) Eye Weather then called Eddie Brite (an official with the National Weather Service at Midland, Texas), Sylvester Hernandez (Eye Weather's supervisor at Wink), and Owner Montgomery (questioned by her trial assistant, Dean Haney). Eye Weather then rested. (1:269.) There was no rebuttal stage.

The General Counsel and Eye Weather filed posthearing briefs. Because I strike Eye Weather's brief as untimely filed, I do not reach certain statements in Eye Weather's brief, including the several references to matters outside the official record.[3] Although the briefs were not due until Tuesday, October 7, 1997 (1:270), the General Counsel mailed his brief on Friday, October 3. Eye Weather's brief, however, by Montgomery's own certificate of service, shows that she did not mail Respondent's brief until the due date itself. As shown by the date stamp on the face of the document, Eye Weather's brief was not received at the office of the Atlanta Judges Division until (Friday) October 10, 1997—3 days late. The Board's rules consider a brief timely filed if it is mailed before the due date even though it is not received until after the due date. *Delta Mechanical*, 323 NLRB No. 5, slip op. at 2 (Feb. 26, 1997). I so commented on the record, and Montgomery indicated her understanding. (1:8, 270–271.) In short, Montgomery is in no position to plead ignorance of the rules. In fact, the circumstances give all the appearances that Montgomery, rather than mailing Eye Weather's brief on Monday, October 6 (which would have rendered her filing timely even if not received until Friday, October 10), deliberately delayed the mailing an extra day (to the due date of October 7) so that she could have time to reply to points made in the Government's brief, a brief she apparently received that Monday, October 6.

In *Delta Mechanical*, as I there recite, I accepted and considered the Respondent's brief even though it, too, was not sent (by Federal Express) until the due date. The big differences there, however, are that Respondent caused a courtesy copy to be hand-delivered to me on the due date, and nothing indicated that the delay was deliberate and for the purpose of reading or responding to the Government's brief. So far as is shown there, the General Counsel mailed the Government's brief the day before the due date. Thus, nothing indicates that the Respondent there was able to receive, read, reply to in Respondent's brief, and mail Representative's brief, including the copy hand delivered to me, all in the same day. In short, Respondent's mistake there appears to have been innocent and resulting in no advantage for the Respondent.

Here the General Counsel's brief was mailed a bit early. Whether that slightly early mailing can be treated as an invitation for the opponent to read and reply in the opponent's brief, I need not decide, because Eye Weather was not able to insert her reply pages and get her brief postmarked by the day before the due date. In short, by delaying her mailing in order to reply, Eye Weather's brief was mailed late and filed late. [Oddly, the General Counsel did not file a motion for leave to file his own reply brief, which a party, with leave, may do. See *Fruehauf Corp.*, 274 NLRB 403, JD fn. 2 (1985).]

Because Respondent's brief here was filed untimely, and because, unlike in *Delta Mechanical*, it appears that Eye Weather deliberately delayed filing its brief in order to take advantage of the Government's early filing, and to reply to points made in the Government's brief, I shall not consider Eye Weather's posthearing brief which was not filed until October 10, 1997—3 days late—and I shall strike it.

On the entire record, including my observation of the demeanor of the witnesses, and after consideration of the brief filed by the General Counsel, I make these

FINDINGS OF FACT

A. *Facts*

1. Continuation of the work force

For some years before March 1, 1997, Midwest Weather, Inc. was the Federal Aviation Administration's (FAA) contract weather service observer for the airport at Wink, Texas. (1:11, 130.) Midwest's contract ended at the close of Friday,

[1] All dates are for 1997 unless otherwise indicated.

[2] References to the one-volume transcript of testimony are by volume and page. Exhibits are designated G.C. Exh. for the General Counsel's and R. Exh. for Respondent's. There are no union exhibits.

[3] NLRB Form 4668, the summary of standard Board procedures for unfair labor practice trials, attached to the complaint, begins the fifth paragraph with this sentence: ''An official reporter will make the only official transcript of the proceedings, *and all citations in briefs and arguments must refer to the official record*.'' (Emphasis added.)

February 28 when the hands of the clock struck midnight. At that same moment, as Saturday, March 1, 1997, began, Eye Weather took over the operation of observing the weather at the Wink airport for the FAA. (1:11.) This was pursuant to the FAA's November 26, 1996 solicitation of bids, Eye Weather's December 5, 1996 bid, and the FAA's February 10 award to Eye Weather. (G.C. Exh. 2 at A1.)

During its tenure at Wink, Midwest had enjoyed contractual relations with the Union. A copy of the January 1, 1994 through December 31, 1996 collective-bargaining agreement is in evidence as one of the several attachments to the FAA's solicitation. (G.C. Exh. 2 at J44; R. Exh. 12.) As reflected by the amended pleadings (1:14–15), the following described employees constitute a unit appropriate for the purposes of collective bargaining within the meaning of Section 9(b) of the Act:

> All employees employed by Eye Weather at the Winkler County Airport in Wink, Texas, taking weather observations, excluding supervisors.

Other than the name of Eye Weather, the stipulated bargaining unit is the historical bargaining unit represented for years by the Union. (G.C. Exh. 2 at J45; R. Exh. 12 at 2.) Midwest staffed its operation with five unit employees, plus one supervisor. (Charles Cooper, 1:50, 55.) The bargaining unit workforce consisted of Sylvester Hernandez, Ruben Lujon, Benjamin F. Pierce (a part-time employee), Kenneth Wheeler, and Judy Whitson. (1:134, Whitson.) As described by Montgomery, during the evening hours just before March 2, and into the first hours of March 2, she met with the employees, they applied for work with Eye Weather, Montgomery hired the five, with a probationary period of 90 days, and explained the pay and benefits to them. She told them that a Clifton Green would be the new supervisor, and that additional employees would be reporting for work. (1:48–55, 81, 92, 233–235, 249.) Within a day or two, Montgomery learned that Green would not be available to work at Wink, and she therefore appointed Sylvester Hernandez as the supervisor. (1:92.)

According to Montgomery, she hired several other employees, including Dean Haney (1:42, 232), around February 20, but for various reasons they were not available to start work until much later, with Haney's first day at work (1:42, 256, 267) at Wink, not being until May 8. Indeed, Montgomery fixes May 8 as the date when she finally had her ''full complement'' of weather observers, full time and part time, in place. (1:252–253, 257–259.) This is based on her preference of having some six to eight, including part time, rather than the required minimum of five, so that she would not have to pay any overtime. ''Sometimes I have eight; sometimes I have six. You know, it just depends.'' (1:82–88, 257, 259.)

I do not credit Montgomery regarding the hiring she claims to have done in February. No documents were offered (such as employment applications, letters of hire, W–4 forms, I–9 forms, insurance forms) and none of the claimed hirees, including Dean Haney, testified in corroboration—and Haney was present at the trial assisting Montgomery. The first outsider who came in and worked did not begin work until April 3. Haney apparently was employed elsewhere for Eye Weather, and also served as Eye Weather's representative in communicating with the Union (as I discuss shortly). Montgomery may well have had some generalized idea of later hiring some additional weather observers at Wink. But as Montgomery admits (1:89–90), when Eye Weather took over the operation at Wink, the only workers Eye Weather had on duty for the first 3 weeks of operation were the same five who had been working for Midwest: Sylvester Hernandez (the supervisor), Ruben Lujon, Benjamin F. Pierce, Kenneth Wheeler, and Judy Whitson.

Respecting the matter of the employees hired by Eye Weather, I note that Eye Weather's contract with the FAA contains a paragraph of some relevance under the heading, ''Contract Employees.'' That paragraph reads (G.C. Exh. 2 at H3):

> The contractor shall submit a list of all employees by name who are to work at this site no later than fifteen (15) days after receipt of contract award. A list of all employees is required quarterly, or immediately when there is a change. The list must contain the date of employment and the date of termination of each employee. A copy of the list shall simultaneously be mailed to the System Requirements Branch, and the Contracting Officer's Representative. See Section J, Attachment J–3, List of Contract Employees. The Contractor and his employees shall be subject to all rules and regulations relative to entering and leaving the buildings and grounds.

Attachment J–3, List of Contract Employees, apparently what would be pages J28–29, are missing from General Counsel Exhibit 2. Although Attachment J–3 would be a blank form, presumably Eye Weather complied with the requirement specified by the contract and submitted a completed Attachment J–3 to the FAA ''no later than fifteen (15) days after receipt of contract award.'' That receipt appears to have been around Tuesday, February 18. (1:34, 38–39, Montgomery.) Two weeks from then would have been Tuesday, March 4, a date following the hires Montgomery made the evening of March 1/March 2. In short, that completed document, presumably on file with the FAA, should show, according to the contract, the names of employees who had been hired by March 4 or 5, 1997. None of the parties, apparently, saw fit to subpena this document from the FAA. Based on the findings I have made, I further find that the completed Attachment J–3, which presumably is on file with the FAA, shows only the names of those whom Montgomery hired on March 1 and March 2, and none of those whom she contends that she hired in February 1997.

There is no dispute that the continuing work force used the same weather observation equipment and instruments under Eye Weather as they had been using as employees of Midwest. Eye Weather did use some forms that were different. (1:130–134, Whitson.) Indeed, the contract provides for the FAA to provide all the equipment used for observing the weather. (G.C. Exh. 2 at G1–2.)

2. The request for recognition

When Midwest lost the contract for Wink, Midwest and the Union, who were in the process of negotiating new wage rates for a renewal contract, terminated their negotiations. (1:116, Schneider.) [Although Union Representative Schnei-

der recalls that this was on March 1 (1:117), it more likely was some days earlier, in February, after Midwest presumably received a notice that it was not the successful bidder.] Schneider testified that Dave Capasso, the Union's representative who had been negotiating with Midwest, advised him [and this possibly was on March 1] to write Eye Weather to introduce himself and to request negotiations. (1:95.) On April 2, Schneider sent Montgomery a letter (1:56, 95), the text of which reads (G.C. Exh. 3):

> This letter is to inform you that we have a majority of the workers that are employed as Weather Observers at the Wink, Texas station.
>
> These employees have expressed a desire to become Union, and we are very happy to have them as our members.
>
> Your cooperation and immediate attention to this matter is [are] deeply appreciated. We would like to resolve this issue within five (5) days.
>
> If you need any more information, you may reach me at (504) 943–8864, Ex. 156.

For some reason, Schneider's letter does not identify Schneider (other than at the closing) or expressly request bargaining, the topics suggested by Capasso. The additional failure to mention successorship has a probable explanation, one which I reach in the next paragraph.

As Schneider testified, after the 5 days had elapsed, and he had not heard from Montgomery, he went to his superior, Chief Organizer Wade Rathke, and asked whether he should file for an election or do something else. ''*I didn't know what to do. I was a new representative*.'' (Emphasis added.) Rathke told Schneider that there already was a contract there and that, if Eye Weather was not going to negotiate, Schneider should file charges with the Board. (1:98–99, 120–121.) This conversation, I find, was about Friday, April 11.

About, as I find, Saturday, April 12, Schneider telephoned Eye Weather and spoke with Montgomery. (1:58, Montgomery; 1:95-96, 115, Schneider.) The content of that conversation is disputed. Schneider testified that, on reaching Montgomery, he introduced himself, as a representative of the Union representing the employees, ascertained that she had received his letter, and gave a short speech about what the Union had done in fighting ASOS. (1:96.) [ASOS is an acronym for Automated Surface Observation System, a computerized instrument system that can be used in lieu of human observers. (1:29–32, Montgomery.)] Schneider then said that he had spoken to his chief organizer and learned that Midwest had a collective-bargaining agreement before Eye Weather had taken over, and that the Union wanted to renegotiate the contract Eye Weather, keeping the language, but renegotiating on wages and health and welfare and the duration.

Montgomery said that she knew of no union members at the station, and that she preferred that he discuss the matter with Dean Haney who, while not an attorney, would be representing her. Montgomery added that she thought it inappropriate to discuss wages and other matters ''if we don't even have union members here.'' Schneider assured her that there were union members at Wink. Montgomery said that if the Union had members then why was Schneider scared of a vote. Schneider said he was not scared of a vote, but that had already been done in the past and now there was no need to do it again because there is a successorship. In any event, there was a collective-bargaining agreement and all the Union wanted to negotiate was wages and to do it quickly. Schneider offered to fax a proposal, but Montgomery insisted that he speak to Haney. She gave Schneider Haney's phone number. That ended the call. (1:97–98, 106–107, Schneider.)

In Montgomery's version, which I do not credit to the extent it is materially different from Schneider's, the ASOS topic was discussed, and Schneider said the Union represented a majority of the Wink employees, and that Eye Weather had two options, either to recognize the Union and negotiate, or to take a vote. [Schneider specifically denies describing such as options. 1:106] Montgomery said she had no problem with a vote. She does not recall Schneider's ever mentioning the labor agreement between Midwest and the Union, and she knows that Schneider never used the term ''successor.'' She asked that Schneider speak with Dean Harvey. (1:58–63, 67.)

In crediting Schneider over Montgomery, I count his admitted inexperience as support for the less than smooth manner in which the Union's approach developed. First, Schneider's April 2 letter, already delayed from Capasso's March 1 suggestion that he write Eye Weather, does not expressly mention the introduction which Capasso suggested. Second, the letter's second-paragraph references to ''have expressed'' and ''we are very happy'' could be interpreted as meaning that Schneider had been busy persuading the majority at Wink to sign membership cards before he sent his letter to Eye Weather. Third, his April 2 letter does not expressly request negotiations. Fourth, the letter does not mention the concept of successorship. The latter two major discrepancies are explained by his inexperience, and he apparently was educated in his April 11 session with Chief Organizer Rathke. The first item also can be attributed to someone who is new at his job. As for taking the time to organize, that is what union organizers do. The important factors are that, in his April 12 telephone conversation with Montgomery (following Schneider's schooling the day before), Schneider requested bargaining and expressly relied on successorship.

Finally, and of great importance, Schneider appeared to be a sincere witness. By contrast, Montgomery appeared insincere and, at times, evasive. At other times Montgomery answered questions calling for simple answers with vague and ever-changing responses. She gave the impression that she was calculating the impact of her answers on the merits of her case, and, if perceived to be necessary, responding in a disingenuous manner in order to avoid divulging information that she perceived might damage her defense.

A few days after his April 12 telephone conversation with Montgomery, Schneider reached Haney by telephone. (1:101.) Haney said he was aware of the earlier conversation. Schneider asked to negotiate. Haney said that Eye Weather wanted an election. Schneider said no because the Union had a contract and simply wanted to open it up to renegotiate the wages. Haney said that Montgomery reported that Schneider had offered options, one being an election. Not so, Schneider replied, stating to Haney that, while he had explained to Montgomery that there are such things as elections where employees (vote to) determine whether there is going to be a union, here there had already been an election and that the

Union has a collective-bargaining agreement. Haney said that Eye Weather preferred to have an election. Schneider replied that ''an election is not even an option with us. We already had an election.[4] We already have a union in place there. We have a collective-bargaining agreement in place.'' Schneider went on to say that the contract mentions successorship[5] and that there ''are rules of successorship if you hire the majority,'' and that the ''Union has successorship'' because Eye Weather took over a successor contract, and that Midwest's contract (with the FAA) ''had a union agreement,'' an agreement which Eye Weather had used in calculating [as Montgomery concedes, 1:38] wages and benefits for its bid, and now the Union wanted to renegotiate those wages because there were none expressed for the years 1997 through 2000. Haney said he would give his answer in writing. (1:102–105.)

By letter dated April 16 (a letter approved by Montgomery, 1:62), Haney wrote Schneider the following text (G.C. Exh. 4):

> This is in response to your letter of April 2 and your follow-up telephone conversation with Ms. Montgomery. During that conversation Ms. Montgomery asked what you expected her to do concerning your letter. In response, you informed her there were two options: one was to take a vote and the other was to recognize you as having a collective-bargaining agreement and negotiate a contract.
>
> Eye Weather respectfully declines your proposed option of recognition and negotiation. However, Ms. Montgomery endorses conducting a vote. I am submitting a petition to the NLRB for a secret ballot election to determine if your majority claim is factual.

When shown this letter at trial, Schneider specifically denied the first-paragraph claim that he had given Montgomery two options, one being a vote. (1:106.) As mentioned, I have credited Schneider, and I do so respecting his specific denial as well as generally.

The original charge in this case, which was filed on April 4, complains of threats and a reduction of hours, all in violation of Section 8(a)(1) and (3). The first amended charge of May 5, a date occurring after the April 16 refusal to recognize and bargain, added the 8(a)(5) allegation (specifically relying on ''successorship''). [While the charge was not filed until something over 2 weeks would have elapsed after the Union received Haney's letter of April 16, I note that Schneider signed the first amended charge of May 5 on April 22. Thus, the ''successorship'' allegation was no afterthought by Schneider.]

3. Type of weather observer certification

At trial, Montgomery argued that Kenneth Wheeler and Judy Whitson could not be part of the bargaining unit because they did not have the proper certificate for observing the weather at Wink. (1:68, 76.) That is, the contract calls for the observers to be certified by the NWS (National Weather Service) ''to take official aviation weather observations.'' (G.C. Exh. 2 at C1.) Further, ''c. It is the contractor's responsibility to insure that all employees are certified in taking weather observations.'' (G.C. Exh. 2 at C3.)

Eddie Brite, the NWS official, testified that the certificate required for weather observers at Wink is, and was during the relevant time, an ''aviation'' certificate. (1:163, 167.) An ''aviation'' certificate, Brite testified, is different from a SAWRS certificate which is not applicable to Wink. (1:167–169.) Brite testified that a SAWRS observer was not legally qualified to take weather observations at Wink. (1:171–172, 182.) To take official weather observations at Wink, the observer must be properly certified by the FAA. (1:194; R. Exh. 5.) During the relevant time, the certificates possessed by Kenneth Wheeler (R. Exh. 6) and Judy Whitson (R. Exh. 2) were SAWRS certificates. Wheeler and Whitson, Brite testified, were not legally qualified to take weather observations at Wink. (1:182–183.) Eye Weather therefore argues that Wheeler and Whitson are not to be counted as part of the bargaining unit. (1:179.)

Brite does not know whether the FAA expunges observations recorded by someone who was not properly certified. (1:174.) Nor does he know what sanctions, if any, the FAA imposes on a contractor who is employing an observer who does not have the proper certificate. (1:194–195.) Brite has not sought any sanctions against Eye Weather. (1:207.) If a SAWRS observer were taking remedial training to upgrade to an aviation certificate, whether that observer could remain during training or have to be removed is a question to which Brite has no answer. (1:208–209.)

Earlier I quoted from the contract about it being the contractor's responsibility to ensure that all employees are certified in taking weather observations. After an orientation period by the FAA, when certification examinations can be administered by the contract officer's technical representative (COTR) of the FAA, ''if additional employees need to be certified the Contractor shall make arrangements with the COTR and shall have the certification examination and competency tests administered to them.'' (G.C. Exh. 2 at C3.) Moreover, during operation of the contract, ''the Contractor is to take corrective action to assure [that quality control] standards are maintained.''

In short, the contract's language suggests that, so long as a contractor (Eye Weather, here) is taking steps to remedy some deficiency, whether in the quality of observations being made or in the type of certification held by a weather observer, it appears (on this record) that the FAA would not automatically declare the observations recorded, at Wink, by a SAWRS observer to be invalid (much less to demand that the contractor fire the observer). Accordingly, I find that Kenneth Wheeler and Judy Whitson are properly counted in the bargaining unit.

According to Montgomery, on April 3 Chester B. Alford III and John McLaughlin began working for Eye Weather at the Wink airport. (1:46–47, 257.) Dean Haney, as earlier noted, began work on May 8. (1:42, 256.) May 8, 1997 is when Montgomery considers that she had her ''full complement'' of employees in place. (1:253, 257–259.)

[4] As Schneider later explains, his reference to a previous election was based solely on the fact that his chief organizer so told him. (1:110.) It appears, however, that there was never an election, and that recognition was by one of the earlier contractors based on cards solicited by a supervisor. (1:227–230, Hernandez.)

[5] It does mention ''Successor Contract'' in sec. I (G.C. Exh. 2 at I7, at sequential p. 29), but that is in terms of sequence, not in the labor-law concept.

B. *Discussion*

Reference to when a ''full complement'' of unit employees is in place, or even of a ''substantial and representative complement,'' is not relevant when the situation, as here, involves an immediate, or near immediate, transfer of the work force to the new employer and the business proceeds without any interruption and without any ''start up'' time of staggered hiring of the initial work force. See *Banknote Corp. of America v. NLRB*, 84 F.3d 637, 644–647 (2d Cir. 1996); *Torch Operating Co.*, 322 NLRB 939 (1997). Accordingly, I find, as alleged, that Eye Weather was a successor employer, in the labor-law sense, to Midwest Weather, and that Eye Weather violated Section 8(a)(5) of the Act on April 16, 1997 it refused to recognize and bargain with the Union.

CONCLUSIONS OF LAW

1. The Respondent, Eye Weather, a Sole Proprietorship, is an employer within the meaning of Section 2(2), (6), and (7) of the Act.

2. The Union, Service Employees International Union, Local 100, AFL–CIO, is a labor organization within the meaning of Section 2(5) of the Act.

3. Eye Weather is a successor employer to Midwest Weather, Inc.

4. Since January 1, 1994 the Union has been the exclusive bargaining representative of Eye Weather's employees in the following appropriate collective-bargaining unit:

> All employees employed by Eye Weather at the Winkler County Airport in Wink, Texas, taking weather observations, excluding supervisors.

5. Since April 16, 1997, Eye Weather has failed and refused to recognize and bargain with the Union in the unit set for above, in violation of Section 8(a)(5) and (1) of the Act.

6. The unfair labor practices affect commerce within the meaning of Section 2(6) and (7) of the Act.

REMEDY

Having found that the Respondent has engaged in certain unfair labor practices, I find that it must be ordered to cease and desist and to take certain affirmative action designed to effectuate the policies of the Act.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[6]

ORDER

The Respondent, Eye Weather, a Sole Proprietorship, Wink, Texas, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Refusing to recognize and bargain collectively with the Union as the exclusive bargaining representative of its employees employed in the following unit:

> All employees employed by Eye Weather at the Winkler County Airport in Wink, Texas, taking weather observations, excluding supervisors.

(b) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action designed to effectuate the policies of the Act.

(a) Recognize and, on request, bargain with the Union as the exclusive representative of the employees in the bargaining unit, described above, concerning terms and conditions of employment and, if an understanding is reached, embody the understanding in a signed agreement.

(b) Within 14 days after service by the Region, post at its space at the Winkler County Airport, Wink, Texas, copies of the attached notice marked ''Appendix.''[7] Copies of the notice, on forms provided by the Regional Director for Region 16, after being signed by Respondent's authorized representative, shall be posted by the Respondent and maintained by it for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or ceased its operation at the facility involved in this proceeding, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since April 16, 1997, the date of the unfair labor practice found in this proceeding.

(c) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official, on a form provided by the Region, attesting to the steps that the Respondent has taken to comply.

[6] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

[7] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading ''Posted by Order of the National Labor Relations Board'' shall read ''Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board.''

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

Section 7 of the Act gives employees these rights.

> To organize
>
> To form, join, or assist any union
>
> To bargain collectively through representatives of their own choice
>
> To act together for other mutual aid or protection
>
> To choose not to engage in any of these protected concerted activities.

WE WILL NOT do anything that interferes with, restrains, or coerces you with respect to these rights, and more specifically:

WE WILL NOT fail or refuse to recognize and bargain with Service Employees International Union, Local 100, AFL–CIO, (the Union) as the exclusive collective-bargaining representative of the employees in the unit described below with respect of wages, hours, working conditions, and other terms and conditions of employment.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

WE WILL, on request, recognize and bargain collectively with the Union as the exclusive bargaining representative of the employees in the bargaining unit regarding their wages, hours, working conditions, and other terms and conditions of employment and, if an understanding is reached, embody such understanding in a signed agreement:

> All employees employed by Eye Weather at the Winkler County Airport in Wink, Texas, taking weather observations, excluding supervisors.

EYE WEATHER, A SOLE PROPRIETORSHIP.